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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-740

CHICAGO & SUBURBAN REFUSE DISPOSAL ASSOCIATION, ET AL.,

Petitioners,

vs.

A. CHERNEY DISPOSAL CO. AND O. Z. MILLER, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

A. CHERNEY DISPOSAL CO. AND O. Z. MILLER, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Chicago & Suburban Refuse Disposal Association et al.,[1] defendants below, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on June 28, 1973, reversing a judgment of the United States District Court for the Northern District of Illinois which had dismissed the plaintiffs' complaint under the Sherman Act for lack of federal jurisdiction.

1. All 28 defendants have joined in this petition and are listed on the signature page 24, *infra*.

OPINIONS BELOW

The opinions and judgments of the courts below are as yet unpublished in the official reporters. The opinion of the court of appeals is reported in 1973 Trade Cases ¶ 74,582 (7th Cir. 1973), and the Slip Opinion is reproduced in Appendix A hereto. We shall refer to the Slip Opinion and cite it as "C. A. Op. A ....". The judgment order and memorandum opinion of the district court is reported in 1972 Trade Cases ¶ 73,958 (N. D. Ill. 1972) and is reproduced in Appendix B hereto. We shall cite it as "D. C. Op. B ....".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The judgment of the court of appeals was entered on June 28, 1973. A timely petition for rehearing was filed and was denied by the court in an order entered on August 9, 1973. This Petition for Writ of Certiorari is being filed within 90 days of the denial of the petition for rehearing. Petitioner Leach Company, which did not join in the petition for rehearing before the court of appeals, was granted an extension of time in which to file its petition for certiorari to and including November 7, 1973, by order of Justice Rehnquist dated September 17, 1973.

QUESTIONS PRESENTED

1. Is the proper test for determining subject matter jurisdiction in a Sherman Act case the "in commerce" or "affects commerce" test of congressional intent set forth by this Court, or may federal jurisdiction be presumed as a matter of law unless it is established that the relationship between the plaintiff's claim and interstate commerce is "clearly non-existent" and "too tenuous," as held by the court of appeals below?

2. Whether the court of appeals could properly impose upon defendants the burden of disproving jurisdiction by holding

that jurisdiction may be presumed based solely on complaint allegations which were denied and contradicted by the defendants' sworn evidence, in light of this Court's decisions in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936) and *First National Bank* v. *Cities Service Co.*, 391 U. S. 253, 289-90 (1968).

3. May a challenge to federal subject matter jurisdiction be raised by motion, or any other appropriate manner, and the issue decided by the court on the basis of a record consisting of affidavits, deposition testimony and pleadings? Or, must there be an evidentiary hearing by a judge and/or jury to determine the issue as suggested by the court of appeals below?

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

Section 8, Art. I of the U. S. Constitution provides in part that:

> "The Congress shall have the Power . . .
>
> * * *
>
> "To regulate Commerce with foreign Nations, and among the several States . . ."

Section 1 of the Sherman Act (15 U. S. C. § 1) provides in part that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2 of the Sherman Act (15 U. S. C. § 2) provides in part that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides in part that "Whenever it appears by suggestion of the

parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. . . ."

STATEMENT OF THE CASE

A. The Proceedings in the District Court

1. The Parties and Pleadings

This case involves alleged restraints of trade with respect to the private refuse collection or scavenger business in the metropolitan Chicago, Illinois area. Respondents, plaintiffs below, are both Illinois corporations with their principal places of business in Chicago (App. 12, 150-54).[2] Both are engaged in the business of picking up and disposing of refuse within the State of Illinois and are owned by the Flood brothers—Joseph, Emmet and William. The two companies combined operate four refuse collection trucks, serving accounts in Chicago and a few close-in suburbs within Illinois (App. 153-56, 165-66, 173-75).

Petitioners, defendants below, are the Chicago & Suburban Refuse Disposal Association (herein the "Association"), a local trade association whose membership consists of 182 private scavenger companies, all but one of which are located in Illinois and pick up and dispose of refuse in the Chicago Metropolitan area (App. 138-40); private scavengers who are members of the Association and their owners or officers or managers; the Executive Director of the Association at the time of the proceedings in the district court (App. 138, 142-43); two companies engaged in the business of disposing by incineration of refuse picked up in the Chicago area; a company engaged in the manufacture, design and servicing of refuse disposal equipment; and a Wisconsin corporation engaged in the manufacture and sale of "packers" and related refuse disposal equipment (App. 14-15, 97).

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2. The record before the court of appeals has been certified and transmitted to the Clerk of this Court and is cited herein as "App. ....".

Plaintiffs' complaint charged that defendants had violated Sections 1 and 2 of the Sherman Act and that these alleged violations had injured plaintiffs in their business or property to the extent of $9 Million after trebling. As described by the district court and the court of appeals, the complaint "alleged that defendants have created unreasonable restraints on competitive opportunities and commercial freedom in the private scavenger business in the Chicago area by acts including price fixing, concerted refusals to deal, reciprocal dealing, collusive bidding, market allocation, boycotts, attempts to drive non-member scavengers out of business, and attempts to monopolize the private scavenger business for member scavengers only . . ." (C. A. Op. A 2 n. 1). Defendants filed answers categorically and unequivocally denying each and every substantive allegation of the complaint (App. 40-104).

2. Defendants' Challenge to Jurisdiction

For nearly six months after filing their answers to the complaint, defendants took discovery, by deposition testimony, from the Flood brothers, the sole officers and owners of the plaintiffs. This testimony revealed that, although plaintiffs' complaint generally alleged interstate commerce, the specific matters of which they complained were clearly local and intrastate and that plaintiffs had no evidence whatsoever to sustain federal jurisdiction over their claims.

Accordingly, on June 6, 1971, defense counsel requested that the district court set a separate hearing on the interstate commerce issue (App. 106, 108-09). Counsel for plaintiffs admitted to the court that his witnesses had no direct knowledge of any facts to support the complaint allegations on interstate commerce but argued that they expected to prove interstate commerce "by witnesses when we are given a chance to proceed with discovery . . ." (App. 110).

The district court then suggested "quick discovery on this interstate commerce issue" and stated that "this may be the crux

of the whole lawsuit" (App. 110-11). It suspended defendants' priority of discovery and gave plaintiffs "carte blanche authority" to take discovery with respect to the jurisdictional issue (App. 111-12), and stated that: ". . . we will have a hearing in October. If there is no evidence at all of the interstate character of this thing, then that will be that, that will be the end of the lawsuit" (App. 114).

Despite the district court's admonishment to complete discovery on the jurisdictional issues and defendants' offers of prompt co-operation, plaintiffs took no depositions and made only one request for documents (with which defendants immediately complied) during the four months between June 6, 1971, and the scheduled hearings on October 12, 1971. At that time, the court gave plaintiffs' new counsel, who had been in the case since August, an additional 65 days for discovery, overruling defendants' objections to further delays, but plaintiffs took no additional discovery during that period (App. 127, 131).

Pursuant to the court's statement of October 12 that, instead of a hearing, defendants should raise the jurisdictional issue by a motion for summary judgment (App. 130), defendants filed such a motion on November 26, 1971 supported by a memorandum of law, seven affidavits and portions of the deposition testimony of the plaintiffs (App. 134-201). Plaintiffs made no attempt to depose defendants' affiants, relying instead on an answering memorandum of law and the affidavit of William Flood, vice president of plaintiffs (App. 202-209), which is, as shown herein, almost entirely based upon third or fourth hand hearsay. Defendants' reply memorandum supported by 13 additional affidavits based on first hand knowledge and additional deposition testimony of plaintiffs, refuted all the hearsay claims in the Flood affidavit (App. 210-63).

B. The Decision of the District Court

The district court stated that defendants should have challenged subject matter jurisdiction by a motion to dismiss, but it nevertheless treated defendants' motion for summary judgment

as one for dismissal and granted the motion (D. C. Op. B3). The court held that the test for jurisdiction under the Sherman Act was as follows:

> ". . . the courts have applied two tests in determining whether particular conduct is '. . . trade or commerce among the several States . . .' subject to the Sherman Act. In the *first*, known as the 'in commerce' or 'qualitative' test, *the Sherman Act is activated if the activity occurs within the flow of interstate commerce*, even though the activity is local and has only an insubstantial effect on the flow of commerce . . . In the *second*, known as the 'affecting commerce' or 'quantitative' test, *activity comes within the Sherman Act if it occurs wholly on the state or local level, in intrastate commerce, but significantly or substantially* affects interstate commerce." (D. C. Op. B4).[3]

The court held that in deciding this motion, it would "consid[er] . . . matters beyond the pleadings when they are presented" and that it was "[t]aking into consideration the affidavits and depositions filed in this matter . . ." (D. C. Op. B3, 7). It then examined plaintiffs' three alleged grounds for jurisdiction[4] and concluded that, under the jurisdictional test of "in commerce" or "affects commerce," and the record before it, these alleged grounds had no merit:

> "Upon the facts before this court, the pleadings, affidavits, and briefs, this court finds that it has no jurisdiction under the Sherman Act to hear this case. *There has been no showing in the complaint and affidavits filed in response to defendants' motion that this court has jurisdiction pursuant to the Sherman Act.*" (D. C. Op. B5).

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3. Emphasis added throughout this Petition unless otherwise noted.

4. These alleged grounds are discussed at p. 19-21, *infra*. Briefly they were: (1) an alleged refusal by an out of state supplier to make a shipment of packer truck bodies used by the private scavengers in the Chicago area in their business; (2) an alleged effect on retail grocery chains, engaged in interstate business in groceries, and which utilize private scavenger services in the Chicago area; and (3) alleged crossings of the Indiana State line contiguous to the Chicago area by defendant scavengers.

C. The Decision by the Court of Appeals

The court of appeals reversed the district court and held that:

> "In essence, *the test* [for jurisdiction under the Sherman Act] is whether '[t]he facts of the particular situation . . . determine . . . [that the] *relationship to interstate commerce is too tenuous in a practical sense to warrant federal control.*'
>
> * * *
>
> "We suggest that neither this Court nor the District Court should 'substitute its judgment for that of Congress in such a matter *unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.*'" (C. A. Op. A13).

It further held that on review of a case dismissed for want of jurisdiction, an appellate court:

> ". . . *must* . . . carefully and *favorably* consider all evidence tendered in support of plaintiffs' asserted cause of action to determine if *under any possible theory* they have plead[ed] facts sufficient to entitle them to avoid a motion for summary judgment, or a motion to dismiss for lack of jurisdiction." (C. A. Op. A14).

Finally, the court held that the defendants' motion should not have been treated as a motion to dismiss and that plaintiffs were entitled to an evidentiary hearing (C. A. Op. A13, 15).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case is in direct conflict with prior decisions of this Court and those of several circuit courts of appeal on matters of great importance relating to federal subject matter jurisdiction in Sherman Act cases.

First, the court of appeals departed from the consistent and well-settled decisions of this Court that the federal courts have jurisdiction over Sherman Act claims only if the matters complained of have occurred in, or have substantially affected, inter-

state commerce. Instead, the court adopted and applied a new, radical and erroneous test that, in effect, presumes federal jurisdiction over Sherman Act claims unless the relation of the facts alleged to interstate commerce is "too tenuous" to warrant federal control or indeed is "clearly non-existent".

Second, the court of appeals imposed upon the defendants the burden of disproving the requisite jurisdictional facts under its new and erroneous test, thereby declining to follow the mandate of this Court's repeated holdings that the plaintiff must at all times bear the burden of establishing jurisdictional facts.

These conflicts between the court of appeals' decision and the decisions of this Court and those of the other courts of appeal should be resolved by this Court.

In addition, this decision by the court of appeals has compounded the confusion that exists among the lower federal courts respecting the proper procedure for raising jurisdictional issues and respecting the matters which the courts may properly consider in deciding the issue. In furtherance of its power of supervision of the lower federal courts, the Court should grant the Writ and reaffirm its previous decisions that a defendant may challenge subject matter jurisdiction "in any appropriate manner"[5] and that the courts in deciding the jurisdictional issues may rely on affidavits, depositions and other evidence properly before them.

A. The Court of Appeals Adopted and Applied a New, Radical and Erroneous Jurisdictional Test Which Is In Conflict With Decisions of This Court and of Other Courts of Appeal.

Until the decision by the court of appeals in the instant case, it was uniformly held that federal courts had subject matter jurisdiction over Sherman Act claims only if the conduct complained of either occurred in interstate commerce or, if intrastate

5. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936); see also p. 15-16, *infra.*

only, that it had a substantial effect on interstate commerce. This Court clearly stated this principle in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234 (1948) and recently reaffirmed it in *Burke* v. *Ford*, 389 U. S. 320, 321 (1967) stating that "*it is well established* that an activity which does not itself occur in interstate commerce comes within the scope of the Sherman Act *if* it substantially affects interstate commerce."

This same test has been uniformly followed by every other court of appeals that has considered the question, including the Seventh Circuit in a previous case.[6] In applying this test the lower courts have uniformly held that the "affects commerce" test is not satisfied by intrastate activity that merely affects an interstate business if the activity does not affect the interstate aspects of the business, e.g., *Page* v. *Work*, 290 F. 2d 323, 330 (9th Cir. 1961), *cert. denied*, 368 U. S. 875 (1961).[7] It has been further established that the interstate flow of supplies used incidentally to the intrastate businesses involved does not satisfy the "in commerce" or "affects commerce" tests, e.g. *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341, 343

6. *Second Circuit: Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269, 270 (2d Cir. 1964); *Third Circuit: United States* v. *Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794, 796 (E. D. Pa. 1965), *aff'd*, 357 F. 2d 806, 808 (3d Cir. 1966), *cert. denied*, 384 U. S. 961 (1966); *Fourth Circuit: Lawson* v. *Woodmere*, 217 F. 2d 148, 150, 152 (4th Cir. 1954); *Fifth Circuit: Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416, 418-19 (5th Cir. 1972); *Sixth Circuit: Marston* v. *Ann Arbor Property Man. Ass'n.*, 302 F. Supp. 1276, 1279-80 (E. D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir. 1970), *cert. denied*, 399 U. S. 929 (1970); *Seventh Circuit: United States* v. *Starlight Drive-In Inc.*, 204 F. 2d 419, 421-22 (7th Cir. 1953); *Eighth Circuit: Hotel Phillips, Inc.* v. *Journeyman Barbers*, 195 F. Supp. 664, 667-68 (W. D. Mo. 1961), *aff'd per curiam*, 301 F. 2d 443 (8th Cir. 1962); *Ninth Circuit: Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341, 343 (9th Cir. 1969).

7. See also *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269, 272 (2d Cir. 1964).

(9th Cir. 1969).[8] This Court has also held that "a few sporadic and incidental" instances of interstate activity are *de minimis* and will not support jurisdiction under the "in commerce" requirement. *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 338-39 (1952).[9] These principles and authorities were relied on and applied by the district court in this case, but were swept aside by the decision of the court of appeals.

The court of appeals not only failed to follow these settled authorities but its decision is in direct conflict with *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969) in which the Ninth Circuit on nearly identical facts and contentions held that the private refuse collection business in Clark County, Nevada was *not in and did not affect* commerce and was not therefore subject to the Sherman Act. Both cases involved claimed restraints of trade in a local refuse collection business and the plaintiff there, as here, asserted that the court had jurisdiction because the refuse companies utilized equipment shipped in interstate commerce. The Ninth Circuit rejected that contention, holding that:

> "Appellant conducted a wholly local garbage disposal and container leasing business. Appellant supplied this business with *equipment from out of state. This fact alone, does not turn what was really a local activity into an interstate one.*" (420 F. 2d at 343).

While the court of appeals below acknowledged that the *Sun Valley* case would have warranted rejecting plaintiffs' contention, the court nevertheless declined to follow the *Sun Valley* holding (C. A. Op. A 8-9).

In reversing the district court and departing from these settled authorities, the court of appeals adopted a new standard

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8. See also *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269, 271-72 (2d Cir. 1964).

9. See also *Page* v. *Work*, 290 F. 2d 323, 328-29, 332 (9th Cir. 1961), *cert. denied*, 368 U. S. 875 (1961); *Yellow Cab Co.* v. *Teamsters Local 881*, 457 F. 2d 1032, 1033-34 (9th Cir .1972).

to ascertain whether or not a federal court has jurisdiction over a Sherman Act claim, relying on dicta from *Rasmussen* v. *American Dairy Ass'n.*, 472 F. 2d 517 (9th Cir. 1972), *cert. denied*, ... U. S. .... (Dkt. No. 72-1471, June 18, 1973), a decision entered after all briefs had been filed in this case. The court held that the test is whether the facts of the particular situation determine that the relationship to interstate commerce is "*too tenuous* in a practical sense to warrant Federal control" and that the courts should not substitute their judgment for that of Congress in such a matter "unless the relation of the subject to interstate commerce and its effect upon it *are clearly non-existent.*" (C. A. Op. A13).[10]

However, the *Rasmussen* case, the only decision relied on by the court of appeals, is certainly no authority for such a radical departure from the uniform decisions of this Court and other courts of appeal. Indeed, the Court in *Rasmussen* very clearly followed the traditional analysis and decisions of this Court. It held that admitted interstate shipments of ingredients for the product, which was the subject of the alleged restraint, satisfied both the "in commerce" and the "substantially affects" commerce tests (472 F. 2d at 524-26). It further held that the alleged restraints on the sale of this product in competition with defendants' fluid milk, which was shipped in interstate commerce, also satisfied the "substantially affects commerce test" (472 F. 2d 524-26). Moreover, *Rasmussen* was decided on the pleadings and stipulated facts and no issue was presented concerning the burden of proving jurisdictional facts which are pleaded but challenged by sworn evidence, such as was presented in the instant case.

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10. The court of appeals relied on statements in *Rasmussen* quoting from a 1946 law review article discussing Justice Cardozo's *dissent* in *Carter* v. *Carter Coal Co.* and a quotation from *Stafford* v. *Wallace*, 258 U. S. 495, 521 (1922) (See 472 F. 2d at 524 n. 15.)

Furthermore, the statements from *Rasmussen* relied on by the court of appeals have nothing to do with the jurisdictional issue, but instead refer to *whether Congress had the power under the Commerce Clause to enact legislation* regulating a certain activity.[11]

The primary error of the court of appeals was its mistaken belief that the test of Congressional *power* under the Commerce Clause to *enact* certain other legislation should also be used to determine whether a specific factual situation falls within the activities that Congress *intended* to regulate by the Sherman Act.[12] This distinction, stated by this Court in the *Stafford* case (258 U. S. at 520), was recently reaffirmed in *Steele* v. *Bulova Watch Co., Inc.*, 344 U. S. 280 (1952), a case involving a claim for trademark infringement under the Lanham Act, which, like the Sherman Act, prohibits certain activities "in commerce" (15 U. S. C. §§ 1051, 1114). Holding that the Lanham Act did apply to the activities alleged in the complaint, this Court stated:

> "*Resolution of the jurisdictional issue in this case therefore depends on construction of exercised congressional power, not the limitations upon that power itself.*
>
> * * *
>
> "*The question thus is 'whether Congress intended to make the law applicable' to the facts of this case.*" (344 U. S. at 282-83, 285).

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11. The statements from the law review article discussing *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936) had reference to the issue of whether Congress had the power under the Commerce Clause to enact the Bituminous Coal Conservation Act of 1935 which regulated coal producers. The *Stafford* case, quoted in a footnote in *Rasmussen*, dealt with Congressional power under the Commerce Clause to enact the Packers and Stockyards Act of 1921 regulating, among other things, commission men and livestock dealers.

12. That the court of appeals was confused on this point is shown by the fact that it prefaced its outline of the new test by referring to the "more recent judicial interpretations of Congressional authority to *enact laws regulating commerce* . . ." (C. A. Op. A12).

Similarly erroneous is the court of appeals' holding that the courts should not substitute their judgment for that of Congress in such a matter (C. A. Op. A13). This is not a case where Congress has specifically stated that it has found that certain activities interstate or intrastate, have an effect on commerce,[13] in which event the courts have deferred to Congress unless it is clear that the effect of the subject on commerce is non-existent, *Perez* v. *United States*, 402 U. S. 146 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). The Sherman Act, however, contains no statements or findings by Congress as to particular and specific activities which Congress intended to be within the Act, and this determination has been left to the courts. In *United States* v. *Darby*, 312 U. S. 100 (1941) this Court explained this distinction in upholding the Fair Labor Standards Act of 1938:

> ". . . *Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act.* . . . [a]nd sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act. . . . In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." (312 U. S. at 120-21).

See also *Perez* v. *United States*, 402 U. S. 146, 152 (1971).

The court of appeals clearly failed to follow the settled decisions of this Court and of courts of appeal in other circuits and its new test for jurisdiction has no authority to support it. Furthermore, as pointed out in more detail below, the court compounded its errors by shifting the burden of proving jurisdictional facts from the plaintiff to the defendants, which is also contrary to the repeated holdings of this Court and other courts of appeal.

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13. E.g., in the Extortionate Credit Transactions Act, Congress made specific findings that "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." (Section 201(a)(3) of Pub. L. 90-321, 82 Stat. 159, reprinted in 18 U. S. C. A. following § 891.)

B. The Court's Holding Improperly Shifts the Burden of Disproving Jurisdictional Facts to Defendants and Is Contrary to the Decisions of This Court and of Other Courts of Appeal.

In *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936), this Court held that plaintiff "must carry throughout the litigation the burden of showing that he is properly in Court." In holding that the plaintiff there had failed to sustain his burden of proving the jurisdictional facts necessary for the district court to act, this Court stated:

> "*If his [plaintiffs] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.* And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose *the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.*" (298 U. S. at 189).

This settled principle has been uniformly followed by this Court[14] and by lower federal courts,[15] including the Seventh Circuit in its previous decision in *Seagram-Distillers Corp.* v. *New Cut Rate Liquors, Inc.*, 245 F. 2d 453 (7th Cir. 1957), *cert. denied*, 355 U. S. 837 (1957).

The court of appeals, however, has shifted that burden to the defendants by its holding that in order for the case to be dis-

14. E.g., *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278 (1936); *Thomson* v. *Gaskell*, 315 U. S. 442, 446 (1942).

15. See *Morgan* v. *Melchar*, 442 F. 2d 1082, 1085 (3d Cir. 1971), *vacated on other grds.*, 405 U. S. 1014 (1972), *aff'd on rehearing*, 467 F. 2d 133 (3d Cir. 1972) (". . . there is a *presumption that a federal court lacks jurisdiction* in a particular case until it has been demonstrated that subject matter jurisdiction exists"). See also *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F. 2d 1320, 1322-24 (3d Cir. 1972); *Page* v. *Wright*, 116 F. 2d 449, 451-54 (7th Cir. 1940), *cert. dismissed*, 312 U. S. 710 (1940); *Nieves* v. *Stamford Hospital*, 345 F. Supp. 1014, 1016 (D. Conn. 1972); Fed. R. Civ. P. 12(h)(3).

missed for lack of jurisdiction, it must be shown that "the relation of the subject to interstate commerce and its effect upon it are clearly non-existent" (C. A. Op. A13), and its conclusion that:

> "Unlike the rule governing us on the usual appeal where we are required to look with favor on all evidence supporting the decision of the trier of fact, *we must here carefully and favorably consider all evidence tendered in support of the plaintiffs' asserted cause of action, to determine if under any possible theory they have plead[ed] facts sufficient to* entitle them to avoid a motion for summary judgment, or a motion to dismiss for lack of jurisdiction." (C. A. Op. A14).

This holding is in direct conflict with this Court's decision in *McNutt* and other cases holding that a plaintiff is *not* permitted to rest on his pleadings when his jurisdictional allegations are challenged and that the "trial court is *not bound by the pleadings of the parties,* but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, *'inquire into the facts as they really exist.'*" (298 U. S. at 184). (See also p. 15, *supra* n. 14, 15).

In addition, the court of appeals' decision here is in direct conflict with the decision in *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416 (5th Cir. 1972). In *Rosemound* the Fifth Circuit, on circumstances nearly identical to those presented here, held that dismissal of a Sherman Act claim for lack of federal jurisdiction is proper when a plaintiff, after having been given opportunity to do so, fails to come forward with evidence to support his jurisdictional allegations:

> "After a hearing on defendants' motion to dismiss, the trial court gave all counsel 60 days within which to complete the record on this question. Rosemound took advantage of this time to propound interrogatories to each defendant and then, by letter to the trial court, requested that its decision be postponed until the interrogatories were answered. The decision was delayed and *Rosemound neither sought*

> *any discovery nor proffered any further affidavits to counter those filed by the defendants* in support of the original motion. *On this record we cannot say that Rosemound was foreclosed from submitting all of the jurisdictional facts to the court.* The court's decision on the question of subject matter jurisdiction prior to trial was therefore not an abuse of discretion under Fed. R. Civ. P. 12(d)." (469 F. 2d at 418).

As pointed out in the Statement of the Case (p. 6, *supra*), the district court here admonished plaintiffs' counsel to present evidence of interstate commerce to support the challenged complaint allegations and gave plaintiffs carte blanche authority and six months' time to go out and take discovery to turn up such evidence. Plaintiffs, however, took substantially no discovery and under these circumstances it is certainly not unfair to plaintiffs to hold that they have failed in their burden of proof.

Moreover, the contention by the court of appeals that it is required to "determine if under any possible theory [plaintiffs] have plead[ed] facts sufficient to entitle them to avoid a motion for summary judgment or a motion to dismiss" (C. A. Op. A14) conflicts with the decision of this Court in *First National Bank* v. *Cities Service Co.*, 391 U. S. 253, 289-90 (1968). There the Court sustained a summary judgment on the merits in favor of a defendant in an antitrust case and held that:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, *we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.*" (391 U. S. at 290).

The court of appeals below further erred in holding that the jurisdictional issue could not be decided by "weighing of facts disclosed in pleadings and affidavits . . ." (C. A. Op. A15). In *KVOS* v. *Associated Press*, 299 U. S. 269, 278 (1936), this Court held that a complaint should have been dismissed

for lack of jurisdiction despite the fact that an affidavit had been filed by the plaintiff in which he asserted that the jurisdictional amount was exceeded. The Court held that the affidavit should be rejected as being "wholly inadequate" because it was "a mere conclusion unsupported" and that "the respondent having failed to support the allegations as to amount in controversy, the district court should have dismissed the bill" (299 U. S. at 279). See also *Kloeb* v. *Armour & Co.*, 311 U. S. 199, 204 (1940) where this Court held that the district court had properly dismissed an action for lack of jurisdiction, noting that "the district judge *weighed the petitions and relevant affidavits* and concluded that the controversy was not within the jurisdiction of that court." This same rule has repeatedly been followed by other courts of appeal and district courts.[16]

Moreover, there was no real conflict among the affidavits submitted to the district court except to the extent that the hearsay contentions in the affidavit submitted by the plaintiffs were completely and flatly contradicted by first hand knowledge affidavits submitted by the defendants (pp. 19-21, n. 17, 18 *infra*). Under these circumstances the courts have repeatedly held that the "[h]earsay affidavits should be disregarded" in favor of first hand knowledge affidavits. *Lyon Ford, Inc.* v. *Ford Motor Co.*, 342 F. Supp. 1339, 1343 (E. D. N. Y. 1971). *Accord, Daily Press, Inc.* v. *United Press Int'l.*, 412 F. 2d 126, 133 (6th Cir. 1969), *cert. denied*, 396 U. S. 990 (1969); *Durovic* v. *Palmer*, 342 F. 2d 634, 637 (7th Cir. 1965), *cert. denied*, 382 U. S. 820 (1965); 6 Moore Federal Practice ¶ 56.22[1] (2d ed. 1972).

16. E.g., *O'Hare Int'l. Bank* v. *Hampton*, 437 F. 2d 1173, 1176 (7th Cir. 1971); *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co., Inc.*, 146 F. Supp. 594, 597-98 (S. D. Cal. 1956), aff'd *per curiam*, 245 F. 2d 874 (9th Cir. 1957); *Williams* v. *Minnesota Mining & Mfg. Co.*, 14 F. R. D. 1, 5-6 (S. D. Cal. 1953).

C. Defendants Have Been Substantially Prejudiced by the Court of Appeals' Failure to Follow the Decisions of This Court.

The affidavits, testimony and other evidence and briefs that were submitted to the district court in this case were obtained on the premise that the test to be applied was whether the activity complained of occurred in commerce or substantially affected commerce, and this is the test that was in fact applied by the district court (D. C. Op. B4). Similarly, on the appeal the plaintiffs did not urge that a different test should be applied but only asserted that the district court erred because the matters in the complaint were in commerce and substantially affected commerce. Likewise, defendants' brief on appeal assumed that the "in commerce," "affects commerce" test was the proper one to be applied and argued that the district court had properly applied it.

Had the court of appeals followed the settled tests and procedures for determining jurisdiction under the Sherman Act, it would clearly have been required to affirm the decision of the district court below under the facts of this case which showed that the business of collecting and disposing of refuse in the Chicago metropolitan area is a uniquely local intrastate operation with no effect on interstate commerce.

It is difficult to imagine a more localized intrastate business than the private refuse collection business in Chicago, but plaintiffs asserted three grounds for jurisdiction. First, they asserted that an alleged conspiratorial refusal to sell them refuse collection truck bodies that were manufactured by defendant Leach Company outside the State of Illinois met the "in commerce" test for jurisdiction. The district court, however, on the facts before it which constituted at best one or two tenuous incidents where a truck body was claimed to have been denied to plaintiffs,[17] held that these allegations were merely

17. The affidavits filed by defendant Leach Company affirmatively showed that in fact it had previously sold and delivered truck

incidental to the gravamen of the complaint which involved the private scavenger business in the Chicago area (D. C. Op. B5-6). The district court relied on *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969), which the court of appeals conceded *"constitutes valid authority* for the general rule that authorizes the District Court's action . . ." (C. A. Op. A8) but declined to follow it.

Second, plaintiffs asserted that the local activity of the refuse collection business had an effect on grocery store chains that purchased and sold groceries in interstate commerce. The district court summarily dismissed this contention, stating that:

> ". . . *Page* v. *Work* . . . and *Sun Valley Disposal* v. *Silver State Disposal* . . . are persuasive in their reasoning that the test is not whether the acts complained of affected a business which happened to be engaged in interstate commerce, but whether the acts affected the interstate commerce part of the business. On the facts of this case interstate commerce was doubly insulated from effect by the acts alleged. Not only did the defendants' intrastate acts not affect interstate commerce in the business, but *there is no effect, except the most metaphysical, upon the interstate business of the third party grocery chains.*" (D. C. Op. B6-7.)

The court of appeals took issue with the district court's finding, asserting that the complaint allegations of effect on grocery

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bodies to plaintiff and that plaintiffs had cancelled several prior orders that Leach agreed to fill (App. 251, 254). Mr. Flood contends, however, that in 1969 he was unable to obtain a packer truck body from Leach after supposedly having been promised a 30-day delivery by a Leach distributor and implied that this was allegedly due to claimed demands by the Association on Leach (App. 204-05). Affidavits by Leach and the distributor flatly denied the charges and implications, pointing out that in 1969 Leach's normal delivery far exceeded the 30-day period Flood claimed he was promised (App. 251-59). Flood also vaguely referred to an incident where he allegedly attempted to buy a packer from an unidentified company in Ohio (App. 206). Leach filed affidavits from its Ohio distributor denying the charges and filed affidavits denying the broad nonspecific claims of refusal to deal (App. 251, 254, 260-63).

chains were not effectively denied (C. A. Op. A13-14). However, a party cannot stand on the jurisdictional allegations of his complaint, *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936), and furthermore, the allegations were effectively denied by affidavits in the record which flatly contradict not only the allegations of the complaint but of the hearsay affidavit of William Flood submitted in support of it.[18]

Third, the plaintiffs asserted that there had been interstate shipment of refuse. The district court found that while it was alleged that some trucks operating in the Chicago area made a few interstate crossings around the Indiana line contiguous with the Chicago area, these crossings, even if true, were "too small and too trivial, when seen within the context of the scope of the business, to create jurisdiction in a Federal court." (D. C. Op. B7.)[19]

In so holding, the court was following this Court's decision in *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326 (1952) that a federal court does not have jurisdiction when the alleged effect on commerce is *de minimus.*

In dealing with this third ground, the court of appeals admitted that "the plaintiffs' evidence is meager and weak" (C. A. Op. A14), but apparently thought plaintiffs were entitled to another chance. Thus, by the court's own admission the plaintiffs failed in their burden of proof and this alone would have been enough to sustain the district court's decision on this point.

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18. For example, Mr. Flood's affidavit asserted that an employee of one of the defendants had called an employee of National Tea Company, a retail grocery chain, and had threatened that chain with a boycott (App. 202, 207), but it was clear from the Flood affidavit that he was not present during that conversation and was obviously not a party to it. Defendants submitted affidavits by both parties to the alleged conversation that flatly contradicted Mr. Flood's contention (See App. 212-15, 226-28).

19. The facts showed that these crossing constituted less than 0.3% of the total refuse business in the Chicago area (App. 210-11, 221-22, 233-35).

D. This Court Should Grant the Writ in Furtherance of Its Supervisory Powers Over the Lower Federal Courts.

The decision of the court of appeals in the instant case has compounded the confusion among the lower federal courts with respect to the procedure for challenging subject matter jurisdiction in Sherman Act cases. Although this Court in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936) held a defendant may raise lack of federal jurisdiction "in any appropriate manner," the lower courts in Sherman Act cases have not followed this holding nor have they followed Fed. R. Civ. P. 12(h)(3) which very specifically provides that: "*Whenever it appears by suggestion of the parties or otherwise* that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action."

For example, the district court below held that a motion for summary judgment should not be used to challenge jurisdiction (D. C. Op. B3), but other courts have accepted such a motion as a proper way to raise the jurisdictional question in antitrust cases, *John Kalin Funeral Home, Inc.*, v. *Fultz*, 313 F. Supp. 435, 436 (W. D. Wash. 1970), *aff'd per curiam*, 442 F. 2d 1342 (9th Cir. 1971), *cert. denied*, 404 U. S. 881 (1971). Further, the court of appeals below held that a motion for summary judgment attacking jurisdiction should not be treated as a motion to dismiss (C. A. Op. A15), but other courts have said that this is procedurally correct, *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 410, 417-18 (5th Cir. 1972). Indeed some courts have said a motion to dismiss a Sherman Act case for lack of jurisdiction should be treated as one for summary judgment if affidavits are also submitted with the motion, *Klein* v. *Berkely Bldg. Associates*, ... F. Supp. ...., 1973 Trade Cases ¶ 74,595 (S. D. N. Y. 1973).

Finally, some courts have held that the proper way to handle the matter is by a bifurcated trial where the jurisdictional issues

are heard and decided prior to a trial on the merits, *e.g.*, *Mailand* v. *Powerine Oil Co.*, ... F. Supp. ...., 1973 Trade Cases ¶ 74,472 (C. D. Calif. 1972), while others have held that an evidentiary hearing is *not* necessary, *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F. 2d 1320, 1323-24 (3rd Cir. 1972). Even in cases where evidence is to be heard, the courts are also divided as to whether the jury or the court is to decide factual issues with respect to jurisdiction. Compare *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F. 2d 934, 935-36 (9th Cir. 1959) (indicating a jury is required) with *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416, 418 (5th Cir. 1972) (holding a jury is not required under the Seventh Amendment).

Thus, a defendant in a Sherman Act case who wishes to challenge the jurisdiction of a court is at a loss in determining whether to proceed by summary judgment, a motion for dismissal, preliminary hearing or bifurcated trial. And as the instant case indicates, he proceeds at his peril. Here defendants originally suggested a preliminary hearing on the jurisdictional issues but the district court stated defendants should challenge jurisdiction by a motion for summary judgment (App. 130). However, when defendants then filed such a motion, the district court criticized it, saying defendants should have filed a motion to dismiss (D. C. Op. B3). Finally, the court of appeals holds that neither motion is proper and a hearing should be held (C. A. Op. A13, 15). Thus, the courts below have come full circle back to defendants' original suggestion but in the process have placed defendants in a procedural trap that has consumed over two years.

We respectfully submit that this Court should grant the Writ in this case and reaffirm its decisions establishing that the jurisdictional question can be raised by defendants "in any appropriate manner" and that the plaintiff at all times bears the burden of proving the requisite jurisdictional facts.

CONCLUSION.

For the reasons stated herein petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

Dated: November 7, 1973.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972—April Session, 1973

No. 72-1303

A. CHERNEY DISPOSAL CO. and O. Z. MILLER, LTD.,
Plaintiffs-Appellants,

vs.

CHICAGO & SUBURBAN REFUSE DISPOSAL ASSOCIATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-1052

RICHARD B. AUSTIN, *Judge.*

Argued April 11, 1973—Decided June 28, 1973

Before: SWYGERT, *Chief Judge*, KILEY and BARNES,* *Circuit Judges.*

BARNES, *Circuit Judge*:

This is an appeal in a private antitrust action from a judgment of dismissal granted and entered after defendant's motion for summary judgment was treated as a motion to dismiss for lack of jurisdiction. We reverse and remand for further proceedings.

* The Honorable Stanley N. Barnes of the Ninth Circuit, sitting by designation.

I. THE NATURE OF THE PROCEEDINGS IN THE DISTRICT COURT.

We here adopt from the "Judgment Order and Memorandum Opinion" of the District Court, its statement of the cause, proceedings and pleadings leading up to the dismissal.[1]

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1. The complaint charges violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. 1 and 2. Before the court is defendants' motion for summary judgment on all claims under Rule 56 of the Federal Rules of Civil Procedure *or* in the alternative for summary judgment on plaintiffs' claims with respect to the private scavenger business.

Plaintiffs are two small Illinois corporations engaged in the private scavenger business in the metropolitan Chicago area. Defendants consist of a large trade association of private scavengers, private scavenger company members of the Association, refuse incineration companies, individual owners and officers of the member scavenger companies and two scavenger equipment manufacturers.

The complaint alleges violations of Sections 1 and 2 of the Sherman Act. It alleges that the defendants have combined and conspired to restrain and monopolize the private scavenger business within the geographic area including Chicago, its suburbs, parts of Indiana, and Wisconsin contiguous to the Chicago metropolitan area and St. Joseph, Missouri. It is alleged that defendants have created unreasonable restraints on competitive opportunity and commercial freedom in the private scavenger business in the Chicago area by acts including price fixing, concerted refusals to deal, reciprocal dealing, collusive bidding, market allocation, boycotts, attempts to drive non-member scavengers out of business, and attempts to monopolize the private scavenger business for member scavengers only, beginning prior to 1960 and continuing to the present date. These acts are allegedly primarily accomplished through the rules and practices of the trade association and secondarily by pressuring non-Illinois scavenger equipment manufacturers to refuse to deal with plaintiffs. In addition, however, plaintiffs allege that defendants cause labor unrest among plaintiffs' employees, intimidate plaintiffs with physical harm and misrepresent facts to plaintiffs' customers.

The court is presented here with defendants' motion for summary judgment on all claims or in the alternative for summary judgment on plaintiffs' claims with respect to the private scavenger business. All defendants have joined in this motion. Defendants move for summary judgment on the grounds that this court lacks jurisdiction over the subject matter of the complaint. In the alternative defendants seek summary judgment with respect to all plaintiffs' claims which relate to the alleged conspiracy to restrain trade in and

(Continued)

As can be seen, the District Court took a position in the last paragraph of its order contrary to that taken by defendants during pre-trial motions.[2] Its authority for treating this as a motion

1. (Continued)

monopolize the private scavenger business in the market area, thereby reserving for trial only plaintiffs' claim that a non-Illinois equipment manufacturer, Leach Company, refused to deal or to deal on non-discriminatory terms with plaintiffs. Both sides have submitted affidavits and briefs in support of their positions.

The federal courts are courts of limited jurisdiction. The threshold question for a court's determination is whether it has jurisdiction over the cause. While in the antitrust field the result may not be different by considering an attack on the court's jurisdiction as a motion to dismiss for failure to state a claim, or as a motion for summary judgment, it is still in substance an attack on the court's jurisdiction. A challenge to the court's jurisdiction is most properly raised by a motion to dismiss.

Defendants' effort to transform what is essentially a motion to dismiss for lack of jurisdiction into a motion for summary judgment can be of no advantage to them. The only proper court order, if the motion is successful, is dismissal since the court would have no jurisdiction to make determinations on the merits of the claims presented. Perhaps the submission of affidavits, materials outside of the pleadings, led defendants' counsel to the conclusion that he motion should be properly labeled as a motion for summary judgment.

If this motion were properly a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and matters outside the pleadings were presented to the court, then the motion must be treated as a motion for summary judgment as provided in Rule 56. This would be proper because the court would have previously determined that it had jurisdiction, and the thrust of the motion to dismiss, supported by matters outside the pleadings would go to the merits of the issues presented in the complaint. However, it is premature to look to the merits when it is jurisdiction which is being challenged.

Further, there is no bar to the consideration by the court of matters beyond the pleadings when they are presented with a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). 2A *Moore's Federal Practice* § 1209; *Pintozzi* v. *Scott*, 436 F. 2d 375 at 378 n. 3 (7th Cir. 1970). Therefore, the court takes defendants' motion for summary judgment as a motion to dismiss for lack of jurisdiction. The court now turns to the issue of jurisdiction.

2. (a) *Transcript of Hearing on June 2, 1971.*

THE COURT: "Has there been a motion to dismiss on the ground that there is no interstate . . ."

(Continued)

to dismiss—not the motion for summary judgment relied on by the defendants—was to consider this "a speaking motion"—(matters apart and beyond the pleadings—here affidavits and depositions) and cite: 2A Moore's Federal Practice, § 12.09, *Pintozzi* v. *Scott*, 436 F. 2d 375 at 378, n. 3 (7th Cir. 1970).

It is true that note 3 in *Pintozzi* specifically held: "It is appropriate for the trial court to consider in a motion to dismiss under rule 12(b)(1), matters outside the pleading—*i.e.*, the pleadings and orders (made) in the state court, which were attached to [the] motion to dismiss." But this note actually relates to that limited portion of the *Pintozzi* opinion which holds that 28 U. S. C. § 1341 bars the exercise of Federal equity power which interferes with collection of state taxes under adequate state laws.

The reference to *Moore's Federal Practice* Vol. 2A, § 12.09 is not specific. In that section we find certain authorities that are contrary to the rule relied upon by the district judge. We give examples in the margin.[3]

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2. (Continued)

MR. MCGEE: "We took that under consideration, Judge, but the allegations, I think, are sufficient to sustain or to withstand a motion to dismiss."

(App. pp. 108-109.)

(b) *Transcript of Hearing on October 12, 1971.*

THE COURT: "Is there a motion to dismiss based on those grounds?" (Minimal interstate commerce).

MR. MCGEE: "No, your Honor, because as we said, the complaint contained sufficient allegations to withstand a motion to dismiss, so it would require a separate hearing on the issue of interstate commerce, I believe."

(App. p. 129.)

The defendants' motion was one for a summary judgment, either total or partial, and not a motion to dismiss.

(App. p. 134, *et seq.*)

3. "In any case, disputed issues of facts should not be resolved by affidavits on a speaking motion any more than on a motion for summary judgment: affidavits could be used to show that no genuine issue of fact existed, but not to determine such an

(Continued)

Appellee also relies on *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F. 2d 416 (5th Cir. 1972). There a procedure similar to that adopted by the District Judge in this case was approved (p. 418), but on completely different facts. (1) Rosemound, the appellant, had every opportunity to present affidavits to prove interstate commerce, but

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3. (Continued)

issue, and dismissal was proper only if plaintiff had no case as a matter of law." § 1209; p. 2296.

Cited as authority—(in note 18 to said § 12.09) is an opinion by Judge Kalodner of the Third Circuit in *Frederick Hart & Co.* v. *Recordgraph*, 169 F. 2d 580 (3rd Cir. 1948), which supports the text above quoted.

> "It is well-settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue. An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint."

Citing cases, including *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 404 (7th Cir. 1945) and *Farrall* v. *District of Columbia Athletic Union*, 153 F. 2d 647 (App. D. C. 1946), (per Prettyman, J.)

> ". . . the weight of authority generally in the federal courts . . . (and the Eighth Circuit . . .) . . . and the better reasoning conspire in the denial to a defendant of the right to impeach, by affidavits in support of a motion to dismiss for failure to state a valid claim, the essential allegations of a complaint and thereby in effect, to force the plaintiff into a summary trial . . . upon matters of fact explicitly averred in the complaint."
>
> *United States* v. *Assn. of Am. R. R.* (D. Neb. 1945), 4 F. R. D. 510; (Delehant, D. J.).

And in note 21, p. 2298, Professor Moore states, after expressing the general rule that lack of jurisdiction requires a reversal:

> "When the jurisdictional issue is inextricably intertwined with the merits of the case, the courts have generally held that the former should not be decided summarily, but should await trial on the merits."

See: McBeath v. *Inter-American Citizens for Decency Comm.*, 374 F. 2d 389 (5th Cir. 1967), where the Court of Appeals "reversed the dismissal of an action for want of jurisdiction where the jurisdic-

(Continued)

after "only the barest conclusionary statements in the complaint", the "weak" answers to interrogatories "clearly show that none of defendant's products were shipped out of state or entered the flow of commerce." (2) The jurisdictional requirements of the Clayton Act and the Robinson-Patman Act were involved, not the Sherman Act Sec. 1 requirements (as here).

> "This failure of any party to have any interstate business disposes of the Clayton Act and Robinson-Patman claims (citing cases). While these interstate activities could be

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3. (Continued)

tion depended upon effect upon commerce, an issue intertwined with the allegation of conspiracy."

Moore's § 12.09, p. 2311 states:

> ". . . [q]uestions of fact on disputed proof may not be resolved without a trial"; citing Advisory Committee Note, and a Seventh Circuit case, *Butcher* v. *United Elec. Coal Cos.*, 174 F. 2d 1003 (1949), quoting from p. 1006.

A recent Ninth Circuit case involving a summary judgment stated:

> "In considering the propriety of the summary judgment herein, we, of course, must view the evidence most favorable to the appellant."

This was stated as such well-known law as not to require the citation of authority. *Zephyr Cove Lodge, Inc.*, a corporation, v. *The First National Bank of Nevada, etc.*, ... F. 2d .... (No. 71-1059)—decided April 27, 1973). (Slip opinion, p. 5.) The dissenting opinion cited cases for the same principle.

> ". . . all reasonable intendments touching upon the existence of a genuine issue of material fact must be indulged against the moving party. *United States* v. *Diebold, Inc.*, 369 U. S. 654 (1962); *Griffeth* v. *Utah Power & Light Co.*, 226 F. 2d 661 (9th Cir. 1955). This traditional and necessarily rigid requirement stems from recognition that summary judgment is an extremely drastic remedy. 3 Barron & Holtzoff, Federal Practice and Procedure § 1231 (Wright ed.), quoted in *Hoffman* v. *Babbitt Bros. Trading Co.*, 203 F. 2d 636, 637 n. 1 (9th Cir. 1953). Accordingly, summary judgment should be rendered only 'if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed. R. Civ. P. 56(c). *See also Consolidated Electric Co.* v. *United States*, 355 F. 2d 437 (9th Cir. 1966)."

found to violate the Sherman Act if they had a direct and substantial effect on interstate commerce (citing Fifth and Ninth Circuit cases), the evidence introduced below established no such connection." (id. at 418-19); and no "nexus with interstate commerce," (id. n. 1).

II. DID DISPUTED QUESTIONS OF FACT EXIST BEFORE THE DISTRICT COURT?

Plaintiffs' complaint alleges, as the district judge correctly pointed out, three grounds for jurisdiction:

1. Defendants' interference with interstate commerce in scavenger packer equipment for plaintiffs' trucks.

2. Threatening boycotts of retail grocery chains operating in interstate commerce to prevent employment of plaintiffs.

3. Defendants' scavenger business includes substantial transportation and sales across state lines.

If any one of these grounds is substantially disputed, the plaintiffs are entitled to have a trier of fact determine the issues.

In summary, the district court's order held (1) the first allegation was "merely *incidental* to plaintiffs' *local* business"; (2) that the second "did not affect interstate commerce in the business," and "had no effect, except the most metaphysical, upon the interstate business of the third party grocery chains"; and (3) that the admitted transportation across state lines was "de minimis" in its effect upon interstate commerce.

II(1) In support of the court's ruling as to the plaintiffs' first ground (garbage compacting truck equipment), the District Court relied upon *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341, 343 (9th Cir. 1969); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 162 F. Supp. 300 (S. D. Cal. 1958), *rev'd on other grounds*, 274 F. 2d 934 (9th Cir. 1960); and *Page* v. *Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U. S. 875 (1961).

There is no question but that the installation of equipment in one bowling alley in Plattsburg, New York as in *Lieberthal, supra,* might well be held to have no possible substantial effect on interstate commerce. As Judge Hays says at 271:

> "The controlling consideration . . . is a very practical one — the degree of interstate activity in the particular business under review," citing *United States* v. *International Boxing Club,* 348 U. S. 236, 243.

The same could be said of any "purely local restraint applied at a local level to a product which never enters into the flow of interstate commerce." *Page* v. *Work,* 290 F. 2d 323, 331—(9th Cir. 1961, where legal advertising was involved).

In *Lieberthal, supra,* the judge relied on *uncontested* allegations of facts as alleged in the complaint, and assumed they were true. In *Page* v. *Work, supra,* the motion for summary judgment occurred after a trial,[4] on the stipulated limited issue of jurisdiction only.

In *Sun Valley Disposal Co., supra,* recovery was denied on two grounds, first, because it was held no federal cause of action exists where the defendant's alleged illegal acts were sanctioned by the Nevada State Legislature and the Clark County Commission; and *second,* because the acts did not involve interstate commerce, for the defendants "*conducted a wholly local garbage disposal and container leasing business,*" although supplying this business from out of state. "This fact alone, does not turn what was really a local activity into an interstate one." Thus this case, standing alone on its facts, constitutes valid authority for the general rule that authorizes the District Court's action denying the first ground urged by appellant for antitrust jurisdiction.

Appellants, however, urge that *Sun Valley* is not controlling because the case of *United States* v. *Bensinger Company,* 420 F. 2d 584 (8th Cir. 1970) delineates an exception to the general

4. The trial consisted of evidence, affidavits, stipulated facts (30 pages), answers to requests for admissions and interrogatories, depositions, exhibits, excerpts from exhibits and oral testimony.

rule, *i.e.*, that while the mere existence of an appreciable but minute interstate flow of supplies (as in *Sun Valley, Lieberthal, Page and Marks Food*) may not be sufficient to establish jurisdiction, when there is added some appreciable interstate flow to the charge that a conspiracy existed between defendants and manufacturers *located outside of the state*, to block that flow, then a direct restraint on interstate commerce exists, and is actionable under the Sherman Act, Sec. 1. (App. at 205-6, 266, 272). *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, 210, and 211; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

If the instructions given by the District Court to the jury in *Bensinger* (quoted on the appeal),[5] correctly states the law, there is merit to appellants' position here opposing appellees' assertion that the plaintiffs' first ground of alleged jurisdiction is invalid. If a group boycott is alleged, *Klors, supra*,[6] and *Standard Oil Co., supra*, require reversal.

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5. "In cases involving products moving across state lines, or in the flow of commerce, it is not material how much commerce is involved. The Sherman Act (Sec. 1) brands as unlawful any contract or combination or conspiracy."

United States v. *Bensinger, supra*, p. 588.

6. An agreement not to sell products to a small business man is:

"... not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klors, supra*, at 213.

"There need be no showing of the amount of commerce involved and it is no defense that the amount was small. *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1955); *Las Vegas Merchant Plumbers Ass'n.* v. *United States, supra; United States* v. *Pennsylvania Refuse Removal Ass'n., supra; United States* v. *Bensinger Company*, 430 F. 2d 584, 588 (8th Cir. 1970)."

In *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309-310 (1965) it is stated:

"It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives

(Continued)

One of the most recent cases reversing a District Court's determination there was a lack of jurisdiction because of the local nature of the business involved, in which the trial court similarly relied on two of the Ninth Circuit cases herein cited by appellees,[7] states as follows:

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6. (Continued)

of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small;* or whether the effect of the agreement is to raise or to decrease prices." (Footnotes omitted—emphasis added.)

In *Las Vegas Plumbers Ass'n.* v. *United States,* 210 F. 2d 732, 748 (9th Cir. 1954), *cert. denied,* 348 U. S. 817 (1954), the court stated: "The test of the impact on commerce is qualitative not quantitative . . . '§ 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected.' *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 225, ft. note 59, 60 S. Ct. 811, 845, and cases cited therein."

In an old Sixth Circuit case (*Steers* v. *United States,* 192 F. 1, 5 (1911)), it was held:

> "We do not find in the Standard Oil and Tobacco cases any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.
>
> * * *
>
> "We cannot doubt that there may be a conspiracy under the act with reference to a single shipment only, and that, in so far as the rule of insignificance may exist, it does not apply to circumstances like these. This shipment was the entire crop of these three farmers for the year. It was, to them, of large relative value. . . ."

7. *Rasmussen* v. *American Dairy Ass'n.,* 472 F. 2d 517, 521, fn. 9 (9th Cir. 1972)

We note that this case was decided *subsequent* to the decision of the district court in this case, and, of course, comes from another circuit than the Seventh.

". . . an important distinction should be stressed — the distinction between the jurisdictional question, with which we are concerned, and the question of whether, in other respects, a substantive violation of the Sherman Act is alleged.

"The two problems are frequently confused, and understandably so. *See* P. Areeda, Antitrust Analysis 59-60 (Little, Brown & Co. 1967). Section 1 of the Act prohibits contracts, combinations, and conspiracies 'in restraint of trade or commerce among the several States.' This single cryptic phrase defines both the conduct prohibited by the Act and the statute's jurisdictional reach. As the Court explained in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 494-495, 60 S. Ct. 982, 992, 84 L. Ed. 1311 (1940): '[T]he phrase "restraint of trade" which . . . had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words "or commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. . . .' The same general distinction is drawn in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U. S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948), and *United States* v. *Women's Sportswear Manufacturers' Ass'n.,* 336 U. S. 460, 461-462, 69 S. Ct. 714, 93 L. Ed. 805 (1949).

"Whether a defendant's conduct constitutes a substantive Sherman Act violation is entirely a matter of congressional definition; Is the defendant's conduct the type of conduct Congress intended to prohibit? Is that conduct a 'restraint of trade' within the meaning of section 1, . . . The jurisdictional question, on the other hand, concerns Congress' power to reach the defendant's conduct: '[T]he restraint must "occur" in or affect commerce between the states . . . for constitutional reasons.' *Klor's Inc.* v. *Broadway-Hale Stores,* 255 F. 2d 214, 224 (9th Cir., 1958) (emphasis added), *reversed on other grounds,* 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), quoting and discussing *Apex Hosiery Co.* v. *Leader, supra.*

"We are concerned in this case only with the jurisdictional question. We assume, but expressly do not decide,

> that the conduct charged constituted a 'restraint of trade', . . . our sole inquiry is whether the prohibition of that conduct falls within 'the utmost extent of [Congress] . . . Constitutional power.' *United States* v. *South-Eastern Underwriters' Ass'n, supra.*
>
> "On its face, this test is extremely broad. Congress' power over interstate commerce is plenary, encompassing not only the regulation of interstate commerce itself, but all measures 'necessary and proper' to that end, including the regulation of commerce that is purely intrastate."

* * *

Just as in *Rasmussen*, where the Appellate Court assumed, but could not decide, that the conduct charged constituted a "restraint of trade," we cannot here decide that issue. Nor can we decide, on the conflicting record before us, that the alleged conduct sought to be regulated had or did not have a "substantial" — (or "appreciable") "economic effect" upon interstate commerce,[8] or "has a real and substantial relation to the national interest."[9]

The more recent judicial interpretations of Congressional authority to enact laws regulating interstate commerce go far beyond what were originally thought to be the limits of that authority. Not only can Congress enact laws which prohibit acts which "interfere with," or "affect" interstate commerce, but can "regulate the local incidents (of interstate commerce) including local activities . . . which *might* have a substantial and harmful effect upon that commerce." [Emphasis added.][10] While this is judge made law, it is no more difficult to follow than Congressional enactments which invoke proscriptions against conduct which "tends" to create a monopoly.[11] "A demonstrable quantitative effect is not necessary."[12]

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8. *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942).

9. *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 255 (1964) quoting *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

10. *Heart of Atlanta Motel, supra*, at 258.

11. Clayton Act § 7; 15 U. S. C. § 18.

12. *Rasmussen, supra*, at 524.

In essence, the test is whether "[t]he facts of the particular situation . . . determine . . . [that the] relationship to interstate commerce is too tenuous in a practical sense to warrant federal control."[13]

We hold that such a conclusion can better be determined after a thorough exploration of all evidence that either side can produce, rather than by a motion to dismiss, particularly when based on conflicting affidavits.

We suggest that neither this Court nor the District Court should "substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." *Rasmussen* v. *American Dairy, supra,* Note 15.[14]

II(2) As to appellants' second ground for jurisdiction (threatened boycott of retail grocery chains), the District Court cited *Page* v. *Work, supra,* and *Sun Valley Disposal Co., supra,* and stated the test "is not whether the acts complained of affected a business which happened to be engaged in interstate commerce, but whether the acts affected the interstate part of the business."

To say that there was "no effect" upon the interstate business of the third party grocery chains, ignores the usual effect of a boycott, actual or threatened, and the charges made in paragraph 14(c) of the complaint (App. at 19). These allegations are but partially and guardedly denied in paragraph 13 of the answer of certain defendants. (App. at 50).[15]

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13. *Rasmussen, supra,* at 524.

14. And see: *United States* v. *Penn. Refuse Removal Ass'n.*, 357 F. 2d 806 (3rd Cir. 1966), which was a government case involving Sec. 1 of the Sherman Act, and practices allegedly illegal *per se,* as here (although there existed more facts more favorable to the government than those presently available to the plaintiff herein.)

15. There is no absolute nor unqualified denial. For example, certain defendants deny any "*unreasonable* restraints on competitive opportunity and commercial freedom in the private scavenger business. (Emphasis added.)"

See also references of threatened boycotts in the affidavit of W. Flood; paragraph 24, as to National Tea Co.; paragraph 25, as to A. & P. Foods; paragraph 26, as to Continental Engineers (App. at 207).

It may very well be that such charges of a threatened boycott can never be proved, but they exist in the record herein and are not effectively denied.

II(3) The existence of existing substantial transportation and sales across state lines.

In this area, the plaintiff's evidence is meager and weak. There is a sworn charge in W. (Mike) Flood's affidavit: (a) that one defendant hauled about 160 truck loads of manure in five years from Washington Park, Homewood, Illinois to the Paulowski mushroom farm in St. Johns, Indiana (App. at 208); (b) that two other defendants hauled refuse from Lever Bros. and others from Hammond, Indiana, into Illinois, and dumped it in a land-fill at 133rd Street and Dan Ryan Expressway. (App. at 209). Some, at least, of such interstate transportation from Indiana to Illinois is admitted in the affidavit of Laurence Beck (App. at 210, et seq.), filed on behalf of defendants.

In *Bensinger, supra,* the alleged conspirators' one act—a threatened refusal to deliver a single dishwasher—satisfied the Sherman Act's Section 1, interstate commerce requirement.

III CONCLUSION.

Unlike the rule governing us on the usual appeal, where we are required to look with favor on all evidence supporting the decision of the trier of fact, we must here carefully and favorably consider all evidence tendered in support of the plaintiffs' asserted cause of action, to determine if under any possible theory they have plead facts sufficient to entitle them to avoid a motion for summary judgment, or a motion to dismiss for lack of jurisdiction.

We conclude that despite the wide latitude ordinarily allowed the trial courts in controlling their calendars we should reverse.

While we sympathize with a trial judge's earnest desire to keep his case-load moving in order to avoid interminable delay occasioned by failure of counsel for plaintiffs to proceed in a timely manner (and particularly in antitrust litigation), and because (as here occurred) the substitution of counsel for plaintiffs was at an awkward time—we nevertheless conclude under all facts and circumstances existing that as a matter of law the defendants' motion for summary judgment should not have been interpreted as a motion to dismiss for lack of jurisdiction, and that the motion to dismiss for lack of jurisdiction should not, on the record before us, have been granted because it required a weighing of facts disclosed in pleadings and affidavits, by the District Court.

Reversed and remanded for further proceedings in accordance with this opinion.